



## Notre Dame Journal of International & Comparative Law

Volume 1 | Issue 1

Article 2

5-1-2011

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### Recommended Citation

López, María Pabón (2011) "What Nations Are Doing About Immigrant Workers in Downturn Economies: Examining and Comparing the Recent Treatment of Immigrant Workers in the United States and Spain," *Notre Dame Journal of International & Comparative Law*: Vol. 1: Iss. 1, Article 2.

Available at: <http://scholarship.law.nd.edu/ndjicl/vol1/iss1/2>

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## ARTICLES

### **WHAT NATIONS ARE DOING ABOUT IMMIGRANT WORKERS IN DOWNTURN ECONOMIES: EXAMINING AND COMPARING THE RECENT TREATMENT OF IMMIGRANT WORKERS IN THE UNITED STATES AND SPAIN**

María Pabón López \*

#### **INTRODUCTION**

In recent times, economic migration across borders has posed challenges to nations integrating foreign workers into their economies. These challenges are a result of two economic phenomena, which are in sharp tension with each other and are deeply impacting immigrant workers and their families. The first phenomenon is the large-scale global movement of peoples that has led to countries where immigrant workers comprise a significant part of the workforce. The second phenomenon is the current economic downturn, which came about following the global financial crisis and the slowdown in the construction industry. In view of these two phenomena, there is a clear need for countries, where large numbers of immigrants work, to assess their responses to the presence of such immigrants within their countries during economic downturns.

This article examines the current treatment of immigrant workers in the United States and Spain. In particular, it examines how the American and Spanish legal systems respond to issues regarding their foreign workers during difficult economic circumstances. This article analyzes the situations in Spain and the United States because: (1) both countries have large immigrant worker populations,<sup>1</sup> (2) each has experienced terrorist attacks perpetrated by

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<sup>1</sup> There is another similarity that Spain and the United States share with regard to their immigrant populations. Both countries are destinations to which irregular migrant workers arrive, and to which the passage can be extremely dangerous. For migrants trying to enter the

noncitizens<sup>2</sup> followed by anti-immigrant backlashes, and (3) both recently have experienced severe economic downturns in their economies.

This article proceeds in three parts. First, it examines the situation of undocumented workers in the United States before and after the recent economic downturn. An examination is conducted through the lens of the U.S. Supreme Court case, *Hoffman Plastic Compounds, Inc. v. NLRB*,<sup>3</sup> and its subsequent impact for undocumented workers. This section also analyzes the situation of undocumented workers in the U.S. following the downturn, through an assessment of the so-called “misery strategy.”<sup>4</sup> This phrase, which first appeared in the *New York Times*, summarizes “[politicians’] one big idea . . . that harsh, unrelenting enforcement at the border, in the workplace and in homes and streets would dry up opportunities for illegal immigrants and eventually cause the human tide to flow backward.”<sup>5</sup>

Second, the article examines the situation of immigrant workers in Spain, both before the economic downturn, when an amnesty program was put in place, and after the downturn, following the enactment of a voluntary immigrant return plan. It compares the two approaches, contrasting Spain’s amnesty and subsequent voluntary return plan to the treatment of undocumented workers in the U.S., including the recent “misery strategy” of enacting a patchwork of state immigration laws. Finally, the article concludes with thoughts about the appropriateness and viability of solutions crafted by the two countries regarding immigrants during difficult economic times.

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United States surreptitiously from Mexico, the crossing of the Rio Grande and later travel through the desert is fraught with dangers including death. For the period 1998 to 2010, a reported 4000 persons have died while attempting to cross to the United States. See Dennis Wagner, *U.S. Laws Blamed for Migrant Deaths*, ARIZONA REPUBLIC, May 17, 2010, <http://www.azcentral.com/news/articles/2010/05/07/20100507immigrants-border-deaths.html#ixzz0ymgiHdZ5> (last visited Apr. 10, 2011). Similarly, the voyage crossing the Mediterranean Sea from Africa to Spain is also extremely dangerous for would-be irregular migrants, who arrive in small boats called “pateras.” See AMNESTY INTERNATIONAL, SPAIN: THE SOUTHERN BORDER: THE STATE TURNS ITS BACK ON THE HUMAN RIGHTS OF REFUGEES AND IMMIGRANTS 13 (2005), <http://www.amnesty.org/en/library/asset/EUR41/008/2005/en/2171a545-d4e8-11dd-8a23-d58a49c0d652/eur410082005en.pdf> (last visited Apr. 10, 2011).

<sup>2</sup> While the catastrophic events of September 11, 2001 are familiar to all worldwide, the March 11, 2004 coordinated bombing attack of commuter trains at the Atocha train station in Madrid were significant as well. Nearly 200 persons were killed and over 1,400 wounded. See Elaine Sciolino, *10 Bombers Shatter Trains in Madrid, Killing 192*, Mar. 11, 2004, N.Y. TIMES, at A1. The ten simultaneous bombings were perpetrated by “a Moroccan cell with links to al-Qaeda . . . and most of those arrested have been Moroccan citizens.” *Madrid Remembers Train Bombings*, BBC NEWS, Mar. 11, 2005, <http://news.bbc.co.uk/2/hi/europe/4338727.stm>.

<sup>3</sup> 35 U.S. 137 (2002).

<sup>4</sup> Editorial, *The Misery Strategy*, N.Y. TIMES, Aug. 9, 2007, at A18.

<sup>5</sup> *Id.*

## I. IMMIGRANT WORKERS IN THE UNITED STATES

The U.S. is home to an estimated 11.1 million unauthorized immigrants.<sup>6</sup> Of these, the Pew Hispanic Center estimates that 7.8 million of them are undocumented workers.<sup>7</sup> Undocumented workers, also known as unauthorized workers, are those who have an irregular immigration status. Foreign workers in the U.S. comprise 15% of the U.S. workforce, or 23.9 million workers.<sup>8</sup> Undocumented workers constitute a subset of the foreign worker population. It appears that foreign-born workers are experiencing the effects of the economic downturn disproportionately since data from 2009 shows that the unemployment rate of the foreign-born workers was higher than that of the native born workers for the first time since 2003.<sup>9</sup> In light of this data, how has the U.S. legal system treated these workers, even before the economic downturn?

Ever since *Hoffman Plastic Compounds, Inc. v. NLRB*,<sup>10</sup> a key U.S. Supreme Court decision from 2002, it is clear that undocumented workers have fewer rights—under both international human rights law and domestic labor law—than U.S. citizens or lawfully present workers. A close review of *Hoffman* will illustrate why this is the case.

### A. *Hoffman Plastic Compounds: The Case Analyzed*

In *Hoffman*, José Castro and other employees of the Hoffman Plastic Compounds chemical production plant in Los Angeles campaigned for a union by distributing authorization cards at their workplace. They did this in support of the United Rubber, Cork, Linoleum, and Plastic Workers of America, an AFL-CIO affiliate.<sup>11</sup> One month after they began this activity, the company discharged the workers who were organizing for the union, including Mr. Castro.<sup>12</sup> Subsequently, Mr. Castro and the other employees filed a complaint with the National Labor Relations Board (NLRB), alleging that the employer had committed unfair labor practices. The NLRB ruled in favor of Mr. Castro and the other employees, ordering the company to (1) cease and desist from

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<sup>6</sup> *Unauthorized Immigrants in the U.S.*, PEW HISPANIC CENTER, <http://pewhispanic.org/unauthorized-immigration/> (last visited Apr. 10, 2011).

<sup>7</sup> See B. LINDSAY LOWELL & RICHARD FRY, *Estimating the Distribution of Undocumented Workers in the Urban Labor Force*, PEW HISPANIC CENTER, at 6, (2002), <http://pewhispanic.org/files/reports/6.1.pdf>.

<sup>8</sup> Bureau of Labor Stat., News Release, FOREIGN BORN WORKERS: LABOR FORCE CHARACTERISTICS 2009, <http://www.bls.gov/news.release/pdf/forbrn.pdf> (last visited Mar. 17, 2011). The Bureau of Labor Statistics notes that “the foreign born include legally-admitted immigrants, refugees, temporary residents such as students and temporary workers, and undocumented immigrants.” *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> 535 U.S. 137 (2002).

<sup>11</sup> *Id.* at 140.

<sup>12</sup> *Id.*

further violations, (2) offer reinstatement and back pay to the employees, and (3) post a workplace notice regarding the order.<sup>13</sup>

During his testimony at an administrative hearing held to determine the amount of back pay owed, Mr. Castro revealed information about his unauthorized entry into the U.S. He also disclosed his lack of employment authorization and that he had used fraudulent documents to obtain employment.<sup>14</sup> The Administrative Law Judge (ALJ) denied Mr. Castro back pay after taking this testimony into account. Mr. Castro then appealed to the NLRB. The NLRB reversed the ALJ's decision and ordered back pay for three and a half years, calculated from the day of termination to the date that the company learned of Mr. Castro's irregular immigration status.<sup>15</sup> Hoffman Plastic Compounds appealed to the U.S. Supreme Court, following the U.S. Court of Appeals for the District of Columbia Circuit's enforcement of the NLRB's back pay order.<sup>16</sup>

The Supreme Court reversed the D.C. Circuit. In a 5-4 decision, the Court held that Congress's federal immigration policy, as expressed in the Immigration Reform and Control Act (IRCA), prohibited the NLRB from ordering the remedy of back pay for an undocumented worker who never had legal authorization to obtain employment in the U.S.<sup>17</sup> This decision resolved a circuit split, as the Second and Ninth Circuit Courts of Appeals had allowed back pay awards to undocumented workers under the National Labor Relations Act (NLRA) in contrast to the Seventh Circuit Court of Appeals, which held exactly the opposite, denying back pay to the undocumented worker.<sup>18</sup>

The majority in *Hoffman* analyzed pre-IRCA precedent, *Sure-Tan, Inc. v. NLRB*.<sup>19</sup> In *Sure-Tan*, the Court held that an employer committed an unfair labor practice by unlawfully reporting undocumented workers, who were union organizers, to the Immigration and Naturalization Service (INS).<sup>20</sup> The Court followed the view that an employer constructively discharges an employee when, in an effort to discourage union activity, it creates working conditions so intolerable that the employee is left with no choice but to resign.<sup>21</sup> Regarding remedies for the unfair labor practice, the Court in *Sure-Tan* conditioned back pay for the undocumented workers who had already been deported by requiring their legal reentry into the country and that they be legally entitled to be present and employed in the U.S.<sup>22</sup> This remedy shows that the Court balanced the NLRA's policy protecting against unfair labor practices with the

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<sup>13</sup> *Id.* at 140–41.

<sup>14</sup> *Id.* at 141.

<sup>15</sup> *Id.* at 142. The amount of back pay (including interest) was calculated at \$66,951. *Id.*

<sup>16</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639 (D.C. Cir. 2001).

<sup>17</sup> *Hoffman*, 535 U.S. at 149.

<sup>18</sup> *Id.* at 142, n.2.

<sup>19</sup> 467 U.S. 883, 902–03 (1984).

<sup>20</sup> *Hoffman*, 535 U.S. at 144 (citing *Sure-Tan*, 467 U.S. at 894).

<sup>21</sup> *See Sure-Tan*, 467 U.S. at 887.

<sup>22</sup> *Id.*

Immigration and Naturalization Act's (INA) policy aimed at deterring immigrant from working while undocumented.<sup>23</sup>

In its opinion, the *Hoffman* Court further inquired into immigration law and policy. It did so by analyzing IRCA's comprehensive scheme that prohibits the employment of undocumented workers and imposes the penalties on both employers and employees for violations of the scheme.<sup>24</sup> In the Court's view, Congress could not have meant for the NLRB to award back pay to an undocumented worker who (1) would be committing a crime by presenting false documents to obtain employment, and (2) could not mitigate damages for back pay by obtaining other work.<sup>25</sup> Thus, the Court decided that immigration policy prevailed over labor policy when these two conflicted. The immigration policy that prevailed was the IRCA's prohibition against the hiring of undocumented workers.

Even though the Court held that no back pay is available for undocumented workers, it did note in its opinion that other NLRA-imposed sanctions, such as cease-and-desist orders and posting of notices to employees of their rights, with contempt enforcement, continue to apply to undocumented workers.<sup>26</sup>

The Court distinguished *Hoffman* from its precedent regarding back pay awards to workers who had engaged in criminal acts. The Court noted that it had not deferred to the NLRB's choices regarding remedies when they "potentially trench upon federal statutes and policies unrelated to the NLRA."<sup>27</sup> The Court also dismissed as a "slender reed"<sup>28</sup> a Congressional report cited by the dissent, which stated that the IRCA "does not 'undermine or diminish in any way labor protections in existing law, or . . . limit the powers of federal or state labor relation boards . . . to remedy unfair practices committed against undocumented employees.'"<sup>29</sup> Finally, the Court noted that this situation needed to be "addressed by Congressional action," not the courts.<sup>30</sup>

Justice Breyer authored the dissent in *Hoffman* and Justices Souter, Stevens, and Ginsburg joined him. The dissent first pointed out how all of the relevant agencies, including the Department of Justice—then in charge of overseeing INS activities—had stated to the Court that awarding back pay to an undocumented worker would not affect immigration policy.<sup>31</sup> Then, the dissent warned that eliminating back pay from the NLRB's "remedial arsenal" left it with fewer "weapons" and only "future-oriented" remedies, such as cease and desist orders. For the dissenters, this action was contrary to the

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<sup>23</sup> *Id.*

<sup>24</sup> *Hoffman*, 535 U.S. at 148.

<sup>25</sup> *Id.* at 149, 151.

<sup>26</sup> *Id.* at 152.

<sup>27</sup> *Id.* at 144.

<sup>28</sup> *Id.* at 150.

<sup>29</sup> *Id.* at 157 (Breyer, J., dissenting)(citing H.R. No. 99-682 pt. 1, at 58 (1986)).

<sup>30</sup> *Id.* at 152 (citing *Sure-Tan v. NLRB*, 467 U.S. 883, 904 (1984)).

<sup>31</sup> *Id.* at 153 (Breyer, J., dissenting).

NLRA's policy, since it allowed employers to violate labor laws "at least once with impunity."<sup>32</sup>

The dissent further noted that the majority opinion constituted the unwarranted removal of a "critically important remedial power" from the NLRB, and that it gave employers a greater incentive to hire undocumented workers.<sup>33</sup> The dissent also criticized the majority for misapplying its own precedent in *Sure-Tan*, and concluded that in *Hoffman*, the NLRB's award of back pay was reasonable and the majority should have respected it.<sup>34</sup> Thus, the dissent criticized the majority for substituting its own view over that of the NLRB.<sup>35</sup>

## B. Effects of *Hoffman*, Especially Pertaining to International Human Rights

*Hoffman* has had domestic law implications for undocumented workers, which have been extensively studied by leading scholars.<sup>36</sup> From the perspective of international law, it is important to note that this opinion authorized an employer to withhold back pay when an undocumented worker was terminated for exercising his recognized human rights.

In response to the *Hoffman* decision, the AFL-CIO filed a complaint with the International Labor Organization (ILO).<sup>37</sup> The AFL-CIO alleged that the Supreme Court's decision contravened Conventions 87 and 98 of the ILO, as well as the 1998 Declaration of the Fundamental Principles and Rights at Work.<sup>38</sup> The protections afforded under these conventions are the fundamental rights to the freedom of association and to organize and bargain collectively.<sup>39</sup> The ILO ultimately ruled that the available remedies left to the NLRB after *Hoffman* were not adequate for effective protection against anti-union

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 155.

<sup>34</sup> *Id.* at 160.

<sup>35</sup> *Id.* at 161.

<sup>36</sup> See Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1 (2003).

<sup>37</sup> See Int'l Labor Org., Committee of Freedom of Ass'n, Rep. No. 332 (LXXXVII, 2003, Series B, No. 3), (U.S.) Case No. 2227, ¶¶ 554–56, May 9, 2003, available at [http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=1300&chapter=3&query=\(\(United+States\)\)+%40ref&highlight=&querytype=bool&context=](http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=1300&chapter=3&query=((United+States))+%40ref&highlight=&querytype=bool&context=) (last visited Apr. 10, 2011) [hereinafter ILO, Committee].

<sup>38</sup> See Int'l Labor Org., *Declaration on fundamental principles and rights at work*, Sess. 86, Geneva (June 1998), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm>.

<sup>39</sup> See ILO, Committee, *supra* note 37, ¶¶ 554–56; Convention 87, 1948 *Freedom of Association and Protection of the Right to Organise*, Art. 2, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087> (last visited Apr. 10, 2011); Convention 98, 1949 *Right to Organise and Collective Bargaining Convention*, Art. 2, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098> (last visited Apr. 10, 2011).

discrimination.<sup>40</sup> The ILO did not mandate any form of remedy or sanction, but it did find that executive and congressional action should address the shortcomings raised by the *Hoffman* decision.<sup>41</sup> Finally, the ILO urged the U.S. government to explore all possible solutions, including legislation, so that all workers in the country could be protected against anti-union discrimination following *Hoffman*.<sup>42</sup>

To date, none of the ILO recommendations have been implemented. To do so would have meant an end to the “long overdue beginning” identified by Professor James Gross,<sup>43</sup> in which international human rights are used to promote and protect the rights of domestic workers. In fact, the result has been quite the opposite. The U.S. government has carried out enhanced immigration enforcement. As a result, during the Bush and Obama administrations, there have been increased workplace raids and pre-dawn raids at workers’ homes.<sup>44</sup> No immigration reform has been enacted, not even the DREAM Act—a proposed federal law that would afford high-achieving undocumented students the opportunity to obtain lawful immigration status.<sup>45</sup> Instead, the U.S. has witnessed the so called “misery strategy”<sup>46</sup> of increased federal immigration enforcement.

In furtherance of the “misery strategy,” and filling the void left by the failure to pass comprehensive immigration reform, the U.S. has seen the enactment of a patchwork of state laws further restricting rights of non-U.S. citizens. Such a state law is Arizona’s SB 1070.<sup>47</sup> In 2010, forty-six states and

<sup>40</sup> See ILO, Committee, *supra* note 37, ¶¶ 554–56.

<sup>41</sup> *Id.*

<sup>42</sup> See *id.* Notably, the *Hoffman Plastic Compounds* decision led to a lengthy advisory opinion by another international human rights body, the Inter-American Court of Human Rights, issued in response to a complaint by the Government of Mexico. See Legal Status and Rights of Undocumented Migrants, Advisory Opinion OC 18/03 (2003) Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003), available at [http://www1.umn.edu/humanrts/iachr/series\\_A\\_OC-18.html](http://www1.umn.edu/humanrts/iachr/series_A_OC-18.html) (last visited Apr. 10, 2011). For a thoughtful discussion of this advisory opinion, see Doug Cassel, *Equal Labor Rights for Undocumented Migrant Workers*, in HUMAN RIGHTS AND REFUGEES, INTERNALLY DISPLACED PERSONS AND MIGRANT WORKERS 477 (Anne F. Bayesfky ed., 2006).

<sup>43</sup> See WORKERS’ RIGHTS AS HUMAN RIGHTS 22 (James Gross ed., Cornell Univ. Press 2003).

<sup>44</sup> See Kevin R. Johnson, *How Racial Profiling in America became the Law of the Land: United States v. Brignoni Ponce, and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1041–42 (2010) (detailing immigration raid activity in several states, including the largest immigration raid in recorded history, which took place in Postville, Iowa in May of 2008).

<sup>45</sup> See The Development, Relief and Education for Alien Minors Act “DREAM Act,” S. 2075, 109th Cong. (2005); The American Dream Act of 2006, H.R. 5131, 109th Cong. (2006). For an excellent discussion of the DREAM Act and how it relates to immigration reform, see Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE ST. L. REV. 1757 (2009).

<sup>46</sup> Editorial, *The Misery Strategy*, N.Y. TIMES, Aug. 9, 2007, available at <http://www.nytimes.com/2007/08/09/opinion/09thu1.html>.

<sup>47</sup> SB 1070, 2010 Ariz. Sess. Laws 0113, amended by 2010 Ariz. Sess. Laws 0211 (H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010)).



the District of Columbia passed 346 laws pertaining to immigration.<sup>48</sup> The rise in the number of such laws has accompanied the downturn in the U.S. economy.<sup>49</sup> This “misery strategy” has become even more pronounced following the economic downturn.

## II. IMMIGRANT WORKERS IN SPAIN

### A. Before the Economic Downturn

In 2005, when the country was at its economic peak, Spain undertook what the *New York Times* called “an immigration experiment worth watching.”<sup>50</sup> At the time, there were 1,714,256 undocumented persons in Spain out of a total population of 43 million.<sup>51</sup> Of those, 1,175,577 undocumented persons were estimated to be in the labor workforce.<sup>52</sup> The process Spain undertook was called a *regularización* (also known as a *normalización*)—or a process of legalization of irregular immigrants. This process granted lawful immigration status to undocumented workers in the country who could meet certain statutory requirements. It also gave them the opportunity to obtain an employment contract with a Spanish employer.<sup>53</sup> The undocumented workers who chose this process obtained an initial residence authorization, or *residencia temporal*, which granted them the right to live and work legally in Spain for one year.<sup>54</sup> This one-year *residencia temporal* could

<sup>48</sup> National Conference of State Legislatures, Immigrant Policy Project, 2010 Immigration-Related Laws and Resolutions in the States (Jan. 1, 2010–Dec. 31, 2010), available at <http://www.ncsl.org/default.aspx?tabid=21857> (last visited Apr. 10, 2011).

<sup>49</sup> *Id.* State laws related to immigration have increased dramatically in recent years. In 2005, 300 bills were introduced, 39 laws were enacted and six were vetoed. In 2006, 570 bills were introduced, 72 were enacted, six were vetoed, and 12 resolutions were adopted for a total of 84. In 2007, 1,562 bills were introduced, 178 were enacted, 12 were vetoed, and 50 resolutions were adopted for a total of 228. In 2008, 1,305 bills were introduced, 139 laws were enacted, three were vetoed, and 64 resolutions adopted for a total of 203. In 2009, more than 1,500 bills were introduced, 202 laws were enacted, 20 were vetoed, and 131 resolutions adopted for a total of 333. In 2010, more than 1,400 bills were introduced, 208 laws were enacted, 10 were vetoed, and 138 resolutions were adopted for a total of 346. *See id.*

<sup>50</sup> David C. Unger, *Editorial Observer: An Immigration Experiment Worth Watching in Spain*, N.Y. TIMES, Mar. 20, 2005, §4, at p. 12.

<sup>51</sup> Francisco Torres, *La Regularización Extraordinaria: Luces y Sombras* [Extraordinary Regulation: Lights and Shadows], PÁGINA ABIERTA (Spain), June 2005, at 160, available at <http://www.pensamientocritico.org/frantor0605.htm> (last visited Apr. 5, 2011).

<sup>52</sup> *Id.*

<sup>53</sup> *See* María Pabón López, *Immigration Law Spanish Style: A Study of Spain's Normalization of Undocumented Workers*, 21 GEO. IMMIGR. L.J. 571, 572, 580–81 (2007).

<sup>54</sup> *See id.* at 580, citing Real Decreto 2393/2004 de 30 de Diciembre, por el que se Aprueba el Reglamento de la Ley Orgánica 4/2000, de 11 de Enero, Sobre Derechos y Libertades de los Extranjeros en España y su Integración Social [Royal Decree 2393/ Dec. 30, 2004, The Consistency of Regulation with the Natural Law/2000 Jan. 11, 2000, Concerning Rights and Liberties of Foreigners in Spain and their Social Integration], B.O.E. 2005, 323, Jan. 7, 2005, available at [http://www.mtas.es/migraciones/proceso2005/RD2392\\_Regto\\_Extranjeros.pdf](http://www.mtas.es/migraciones/proceso2005/RD2392_Regto_Extranjeros.pdf) (last visited Apr. 10, 2011).

be renewed once for another two-year period.<sup>55</sup> Finally, the granting of the residence in Spain would dismiss any deportation orders pending against the undocumented worker.<sup>56</sup>

Of the nearly 700,000 undocumented workers who applied for the *normalización*, 573,270 obtained work and residence permits.<sup>57</sup> This number was nearly the same as those who had been granted immigration status in the three previous *regularizaciones*. Spain's government assessed the *regularización* as a "great success" and estimated that it had reached 90% of the workers in the underground economy.<sup>58</sup>

The 2005 *regularización* meant that Spain coordinated the needs of the undocumented workers with the needs of Spanish employers.<sup>59</sup> There was no reluctance in Spain to meet the needs of the immigrant workers. In fact, in an action that seemed to be welcoming to the immigrants, Consuelo Rumi, then State Secretary for Immigration, moved her office from its long-time placement in the Interior Ministry—the agency in charge of law enforcement—to the apparently more immigrant-friendly Ministry of Labor.<sup>60</sup> Thus, while the main goal of the *normalización* was to reduce illegal employment by regularizing foreign workers, it was also a form of state-sanctioned recognition of the benefits of immigrant worker labor to Spanish society. At the time, the authorities stated that: "If we want to maintain our economic model and a reasonable growth index, we need immigrant work, whether we like it or not."<sup>61</sup>

While the *regularización* was not without its critics,<sup>62</sup> it appears to have at the very least been an open-minded governmental experiment to address both the needs of the Spanish labor market and the influx of undocumented workers. The reaction of the Spanish labor unions, for example, is positive in that they found the *normalización* to be a success.<sup>63</sup> However, a question arises: what would happen when the labor market does not need these workers?

## B. Immigrant Workers in Spain following the Economic Downturn

In 2008, Spain continued experimenting with immigration when it enacted a voluntary repatriation plan known as "Plan de Retorno Voluntario"

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 583.

<sup>58</sup> *Id.*

<sup>59</sup> Unger, *supra* note 50, at 12.

<sup>60</sup> *Id.*

<sup>61</sup> Manuel Pimentel, *Bienvenida la Regularización* [Welcome Regularization], CINCO DÍAS [Spain], Feb. 9, 2005, available at [http://www.cincodias.com/articulo/opinion/Bienvenida/regularizacion/cdsopiE00/20050209cdscdiopi\\_6/Tes/](http://www.cincodias.com/articulo/opinion/Bienvenida/regularizacion/cdsopiE00/20050209cdscdiopi_6/Tes/) (last visited Apr. 12, 2011) (translation from Spanish by María Pabón López).

<sup>62</sup> See López, *supra* note 53, at 583–85.

<sup>63</sup> Torres, *supra* note 51, at 160.

(Plan of Voluntary Return).<sup>64</sup> This plan gave certain lawfully present immigrant workers the opportunity to return to their countries of origin if they could not find employment in Spain. If they followed the plan, they could take with them their accrued unemployment benefits.<sup>65</sup> “Si has decidido regresar . . . tu eliges tu futuro” (“If you have decided to return, you choose your future”) has been Spain’s government slogan to promote its Plan de Retorno Voluntario.<sup>66</sup> The rationale behind the plan is that Spain has been undergoing a harsh economic crisis, causing unemployment to rise in December 2008 to about 14%.<sup>67</sup> Of late, Spain has one of the poorest performing economies in Europe.<sup>68</sup> To cope with the crisis, Spain is sending noncitizen workers back home.

In May 2009, the Spanish Minister of Labor and Immigration, Celestino Corbacho, stated that immigrants were suffering the consequences of the crisis more intensely and urged Spaniards to understand their situation.<sup>69</sup> He further urged Spaniards not think of immigrants as fugitives, but as Spanish citizens bearing the brunt of the crisis.<sup>70</sup>

The Spanish Congress adopted the Plan de Retorno Voluntario on September 19, 2008. Unlike previous immigration programs, like the *regularización* of 2005, which was of limited duration, this plan is permanent.<sup>71</sup> Thus, there is no deadline for applications and the plan is still ongoing.

The following are the requirements for an applicant to qualify for the Plan de Retorno Voluntario: (1) have either permanent or temporary lawful residence in Spain, (2) be unemployed due to employment termination, (3) have been registered at the Public Office of Employment, (4) be entitled to receive unemployment benefits, (5) that the applicant not incur any actions that would prohibit departure from Spain under Spain’s Immigration law, and (6) be a national of a country that has signed a bilateral agreement regarding social

<sup>64</sup> See María Pabón López & Roxana Davis, *Immigration Law Spanish Style II: A Study of Spain’s Voluntary Immigrant Return Plan and Circular Migration*, 24 TEMPLE INT’L. & COMP. L. J. (forthcoming 2011) [hereinafter Lopez, *Immigration Law*].

<sup>65</sup> *Id.*

<sup>66</sup> *Plan de Retorno Voluntario* [Voluntary Return Plan], GOV’T OF SPAIN, [http://www.planderetornovoluntario.es/interior\\_uno.html](http://www.planderetornovoluntario.es/interior_uno.html) (last visited Mar. 30, 2011) (translation from Spanish by María Pabón López).

<sup>67</sup> *España Encabeza el Desempleo en Europa* [Spain Leads Unemployment in Europe], CNNEXPANSION.COM (Jan. 23, 2009), <http://www.cnnexpansion.com/economia/2009/01/23/espana-encabeza-el-desempleo-en-europa>.

<sup>68</sup> *Id.*

<sup>69</sup> Corbacho: *No habrá Brotes de xenofobia en España* [Corbacho: There will not be Outbreaks of Xenophobia in Spain], INTEGRA LOCAL (Spain) (Feb. 5, 2009), <http://www.integralocal.es/index.php?accion=detalleGeneral&seccion=3&tipo=2&id=2994> (last visited Apr. 10, 2011).

<sup>70</sup> *Id.*

<sup>71</sup> Nota de Prensa del Ministerio de Trabajo e Inmigración [Press note from the Ministry of Labor and Immigration], Sept. 19, 2008, [http://extranjeros.mtas.es/es/Actualidad/documentos/cdm\\_retorno\\_final.pdf](http://extranjeros.mtas.es/es/Actualidad/documentos/cdm_retorno_final.pdf).

security matters with Spain.<sup>72</sup> A review of these requirements shows that undocumented workers are excluded from this program, presumably because they had the opportunity to regularize their immigration status three years prior.

Since only citizens of the countries, which have subscribed a bilateral treaty with Spain on social security matters, are eligible for the plan, it is illustrative to list them. They are: Andorra, Argentina, Australia, Brazil, Canada, Chile, Colombia, Dominican Republic, Ecuador, Paraguay, Peru, Philippines, the Russian Federation, Tunisia, Ukraine, Uruguay, the U.S., and Venezuela.<sup>73</sup> Citizens from other countries not on this list, as well as those from the European Union, are excluded from the voluntary return program.

The exclusion of E.U. citizens ensures that applicants will not claim their compensation, depart, and then return to Spain using E.U. freedom of movement policies.<sup>74</sup> The exclusions of the program leave undocumented migrants, who are the most vulnerable to the crisis, without protection. This group is comprised mostly of African workers (except those from Morocco and Tunisia) and a large percentage of Bolivians living in Spain.<sup>75</sup> Again, most these countries are not included in the list. Even if the workers were lawfully present and working in Spain, they would still be excluded. Thus, the list of countries and the lawful status requirement exclude those who could benefit the most from the opportunity to return to their home countries with funds to invest. This situation is in direct contrast to immigrants' option of remaining in Spain without meaningful prospects for employment.

By signing on to the Plan de Retorno, applicants agree to return to their country of national origin within thirty calendar days from the date of receipt of compensation and remain there for three years.<sup>76</sup> The prohibition on returning to Spain is specific to work or professional activities.<sup>77</sup> Thus, visits to Spain outside the scope of work or professional activities would be acceptable.

The immigrant worker receives compensation in the form of a lump-sum of uncollected unemployment benefits in exchange for voluntary return.<sup>78</sup> In addition to the compensation, the Spanish government will pay for

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<sup>72</sup> See generally López & Davis, *supra* note 64.

<sup>73</sup> *Id.*

<sup>74</sup> BBC World Service/Migration Policy Institute - *Migration and the Global Recession Report, September 2009*, at 62, available at [www.migrationpolicy.org/pubs/MPI-BBCreport-Sept09.pdf](http://www.migrationpolicy.org/pubs/MPI-BBCreport-Sept09.pdf).

<sup>75</sup> Gador Manzano & Yolanda Vaccaro, *Take the Money and Run: Voluntary Return Programs*, presented at the Conference on Diaspora and Development for the World Bank, July 13–14, 2009, available at [http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1110315015165/Manzano\\_Vaccaro.pdf](http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1110315015165/Manzano_Vaccaro.pdf) [hereinafter Manzano, *Take the Money*].

<sup>76</sup> Nota Informativa sobre el abono acumulado y anticipado de la prestación contributiva por desempleo a trabajadores extranjeros que retornan a su país de origen, [http://extranjeros.mtas.es/es/Actualidad/documentos/cdm\\_retorno\\_final.pdf](http://extranjeros.mtas.es/es/Actualidad/documentos/cdm_retorno_final.pdf).

<sup>77</sup> *Id.*

<sup>78</sup> See López & Davis, *supra* note 64.

transportation, as well as €50 per family member for travel expenses, and incidentals.<sup>79</sup> The amount of compensation depends on the contributions each immigrant worker has made to the social security fund while working in Spain. In essence, workers who have been collecting unemployment in Spain will only receive the remaining amounts in their funds. Those who have not worked for a lengthy period of time will collect little compensation. The payments average about € 9,035.<sup>80</sup>

Immigrant workers who commit to the plan receive 40% of their compensation before leaving Spain and will collect the remaining 60% when they arrive in their countries of origin—once they appear to confirm their return to the Spanish embassy or consulate in their country.<sup>81</sup> The immigrant workers have a maximum of ninety days, counted from the date of the first payment, to collect the second payment.<sup>82</sup> Once the applicants relinquish their residence cards and other documents linking them to Spain, they will lose their rights to reside and work in Spain.<sup>83</sup> These documents include work permits, national identity cards, social security cards, health care cards, and the like.

After three years, those immigrant workers who had obtained permanent residence in Spain will be able to regain their status following a simplified process yet to be established by the Spanish government.<sup>84</sup> Immigrant workers who had only temporary residence will have to reapply for authorization to work and reside in Spain. While the Spanish government has not guaranteed future employment authorization, it contemplates a “preferred right” for these workers to rejoin the Spanish workforce.<sup>85</sup> However, the time spent outside Spain will not count for the residence calculations.<sup>86</sup> Family members who do not have their own basis for lawful residence in Spain will also lose their status when the principal applicant agrees to return under this plan.<sup>87</sup>

When the Minister of Labor and Immigration first announced the Plan de Retorno in June of 2008, he estimated that more than 1 million immigrant workers would opt to return home. However, by October this number had dropped to 87,000 applicants.<sup>88</sup>

The Instituto Nacional de Empleo (Spain’s Ministry of Labor) began receiving applications on November 17, 2008, and by the end of the first week, it had collected 256 applications. In the weeks that followed, the volume of applications decreased. The first month of the program closed with a total of

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<sup>79</sup> *See id.*

<sup>80</sup> Manzano & Vaccaro, *supra* note 75.

<sup>81</sup> *See* López & Davis, *supra* note 64.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Lisa Abend, *Spain Tries to Buy Out Immigrants*, TIME, Oct. 20, 2008, available at <http://www.time.com/time/printout/0,8816,1852000,00.html> [hereinafter Abend, *Spain*].

767 applications.<sup>89</sup> Overall, approximately 5000 immigrant workers have used the Plan de Retorno Voluntario, leading some to call it a failure.<sup>90</sup> The reasons for the immigrants' reluctance to use the plan include "a rejection of the plan's specific provisions. 'No one wants to give up their residency visa for three years, especially after they've suffered so much to get it . . . .' But there's an even more compelling answer, and it has to do with why new residents immigrated [to Spain] in the first place. "I came for a better life," says [one immigrant], "and I got it. Food, clothing, my apartment—they're all better here than in Bolivia. I'm not interested in going back."<sup>91</sup> Thus, one of the main obstacles to the implementation of the plan would be the differences in the standard of living in Spain as opposed to the countries of origin of the immigrant workers. As the plan is still in its initial stages, it is too early to fully determine its success.

### III. CONCLUSION

These concluding thoughts are preliminary. As the global economic crisis continues to unfold and migration patterns evolve, the solutions crafted by the U.S. and Spain regarding immigrants during difficult economic times will continue to develop. Further research is needed to analyze all the available alternatives for immigrants in downturn economies, including (1) the future of Spain's Plan de Retorno Voluntario, (2) the existence of other bilateral return agreements between countries, and (3) individual savings accounts set up by employers and nongovernmental organizations for returning immigrants. It would also be instructive to explore how to handle immigrants in the current downturn economy from the lens of what happened in the U.S. with the Braceros and the repatriation of Mexicans following World War II.

Initially, it should be noted that the Spanish approach is more proactive and realistic. The government of Spain, both before and after the economic downturn, took decisive action to address the issues confronting immigrant workers. From the *regularización* to the voluntary return plan, Spain has not shied away from directly impacting the lives of the immigrant workers—sometimes at great political risk. It would appear that while still addressing the needs of the country and its economy, the Spanish solutions also address the human rights aspects of the situation. Allowing undocumented workers the opportunity to regularize their immigration status and subsequently return to their countries, gives the workers some measure of humanity.

This stands in sharp contrast to the situation in the United States. The U.S. Congress has not addressed the situation of undocumented workers. It

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<sup>89</sup> See López & Davis, *supra* note 64.

<sup>90</sup> Desempleo y el Fracaso del Plan de Retorno, n.d., EL PAIS DIGITAL (URUGUAY), available at <http://www.elpais.com.uy/101228/pinter-537954/internacional/Desempleo-y-el-fracaso-del-plan-retorno-golpean-a-la-inmigracion/>. Notably, another 6000 immigrants have returned in another voluntary return plan run by nongovernmental organizations in Spain. See *id.*

<sup>91</sup> Abend, *Spain*, *supra* note 88 (citing two immigrants' views on the Plan de Retorno Voluntario).

has failed to enact immigration reform in years, even with widespread agreement of the need for such reform. The only immigration activity is increased enforcement by the federal government and increased encroachment of the states in enacting state immigration laws typically restricting immigrants' rights.

The "misery strategy" of the U.S. is ineffective because it aims to compel undocumented workers to leave the country. However, instead of giving workers a choice, as does the system in Spain, they are driven away by the increased immigration enforcement and the patchwork of state laws that renders their lives miserable. This approach might work, but "only if life for illegal immigrants in America could be made significantly more miserable than life in, say, rural Guatemala or the slums of Mexico City. That will take a lot of time and a lot of misery to pull that off in a country that has tolerated and profited from illegal labor for generations."<sup>92</sup> Thus, the "misery strategy" is a race to the bottom, with erosion of human rights of immigrant workers as the casualty. This situation is untenable, in light of the fact that "people [in the U.S.] cherish lawfulness but resist cruelty, and have supported reform that includes a reasonable path to earned citizenship."<sup>93</sup> It would appear then, that the "misery strategy" has no place in the U.S. policy and should be rejected and discontinued.

Is Spain's model a viable one for the U.S. to follow? It is evident that the political will of the government in Spain is quite different from that of the U.S. The number of immigrant workers in the countries' respective economies differ greatly. Such differences may hinder enacting the Spanish policy in the U.S. Furthermore, the experiments Spain has undertaken have been subject to criticism and rejection. The immigrant workers' reluctance to leave Spain voluntarily is parallel to the "misery strategy," because even in a bad economy, life in their host country is better than life in their own countries.

The severe economic disparities between the host countries and the home countries will always make the host countries more attractive, even in downturn economies. Thus, the host countries must be mindful of their obligations to treat immigrant workers in accordance with international human rights law, even in difficult economic times. These are the times in which immigrant workers are most vulnerable, and their rights must be respected.

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<sup>92</sup> *The Misery Strategy*, *supra* note 4, at A13.

<sup>93</sup> *Id.*